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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

ADELINE B. BENJAMIN,

Petitioner,

v.

ANN VENEMAN, Secretary, United States Department of Agriculture,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit erred in affirming the district court's decision granting summary judgment on the Letter of Reprimand issue insofar as there are material facts in dispute?

2. Whether the Fourth Circuit erred in affirming the district court's decision granting summary judgment where there was direct evidence in the record of reprisal/retaliation?

3. Whether the Fourth Circuit erred in affirming the district court's decision granting summary judgment on the overtime issue where there are material facts in dispute?

4. Whether the Fourth Circuit erred in affirming the district court's decision granting summary judgment on the five-day suspension issue where there are material facts in dispute?

5. Whether the Fourth Circuit erred in affirming the district court's decision in analyzing the issue of pretext surrounding the five-day suspension?

6. Whether the Fourth Circuit erred in affirming the district court's decision granting summary judgment on the hostile work environment claim?

RULE 14.1(b) STATEMENT

Pursuant to Supreme Court Rule 14.1(b), Petitioner Adeline Benjamin states that all parties to the proceedings below appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

CITATION OF OPINIONS AND ORDERS

The initial per curiam opinion of the panel of the court of appeals dated March 8, 2007 is unpublished. App. at 1a. On May 8, 2007, the court of appeals issued an order denying the motion for rehearing. App. at 52a. That decision is unpublished. The district court's unpublished order and opinion were entered on January 31, 2006. App. at 54a. The district court's order and opinion are unpublished. The EEOC (Baltimore District Office) issued its unpublished decision on September 23, 2003. App. at 9a.

JURISDICTIONAL STATEMENT

The Petitioner in the instant case, Adeline Benjamin ("Benjamin") is employed by the United States Department of Agriculture ("USDA" or "the Agency"). Benjamin originally filed her case through the Agency's internal EEO process for investigation. The matter was heard before the Equal Employment Opportunity Commission (Case #120-A2-1245-X). The EEOC issued its decision and the Agency adopted its Final Agency Decision on or about September 23, 2003. App. at 9a. Benjamin timely filed suit in the United States District Court for the District of Columbia on December 19, 2003 (i.e. within 90 days of the date of the Agency decision). Benjamin filed suit under Title VII of the Civil Rights Act. The case was ultimately transferred to the United States District Court for the District of Maryland. App. at 5a. The district court had

jurisdiction of Benjamin's claims under Title VII for sex discrimination, reprisal and for a hostile work environment under 42 U.S.C. § 2000e-5(f)(3) and 42 U.S.C. § 2000e-16(c). The district court had jurisdiction of the Benjamin's claims of age discrimination under 29 U.S.C. § 633a(c). The district court heard oral argument and issued its decision from the bench granting the Agency's Motion for Summary Judgment. App. at 54a. Benjamin timely filed her appeal on February 25, 2006. The Fourth Circuit had jurisdiction of the direct appeal from the district court pursuant to 28 U.S.C. § 1291. By Order dated March 8, 2007, the Fourth Circuit Court of Appeals affirmed the judgment of the district court in a per curiam opinion. App. at 1a. Benjamin then filed a Petition for Rehearing, which the Fourth Circuit denied by Order dated May 8, 2007. App. at 52a. This Court has jurisdiction on a writ of certiorari pursuant to 28 U.S.C. § 1254.

RULES AND STATUTES INVOLVED

The questions raised in this Petition implicate Federal Rule of Civil Procedure, which states in pertinent part as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after

service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may

permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall

> forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

The questions involved in the instant case also implicate 42 U.S.C. §§ 2000e-2 and 2000e-3, which provide in pertinent part as follows:

> **§ 2000e-2. Unlawful employment practices**
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> * * * *
>
> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 U.S.C.S. 2000e, et seq], an unlawful employment practice is

established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C.S. §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C.S. §§ 2000e-2000e-17].

* * * *

STATEMENT OF THE CASE

A. BACKGROUND

At all times relevant hereto, Benjamin was employed as a Grants and Agreement Specialist for the United States Department of Agriculture, Extramural Agreements Division ("EAD"), Administrative and Financial Management, Agricultural Research Service, Beltsville, Maryland. App. at 55a, App. at 13a. This office is responsible for managing cooperative agreements with scientists and universities in the United States and abroad. Benjamin is female and she was born on June 28, 1954 (i.e. over 40). App. at 14a. In September 2000, Benjamin's then-supervisor, Curtis Wilburn, ("Wilburn") gave her a Letter of Warning. Benjamin filed an EEO complaint alleging that she was the victim of a hostile work environment. The disciplinary action is not part of the instant appeal. However, on April 4, 2001, Wilburn gave Benjamin a Letter of Reprimand, contending that Benjamin had failed to return a Performance Plan. Benjamin maintained that she did in fact return the Performance Plan. Benjamin filed an EEO Complaint, contending that the Letter of Reprimand was issued in reprisal for her EEO activity, and that it was based upon her age and gender. In addition, in May 2001 Wilburn gave Benjamin a project; i.e. she was to work on a Congressional Report. Benjamin worked diligently on the project, but Wilburn denied her request for 91 hours of overtime that she worked in completing the Congressional Report. Benjamin filed an EEO complaint, contending that the denial was in violation of Title

VII based upon her age, gender and in retaliation for EEO activity. A hearing was held on these issues before an EEOC Administrative Law Judge on August 14 & 15, 2002. App. at 9a.

In addition to the foregoing issues, the EEOC addressed the claim as to whether Benjamin was the victim of unlawful harassment. App. at 12a. Specifically, Benjamin maintains that her co-workers continually gossiped about her, and made derogatory statements to or about her. Moreover, Benjamin maintains that Wilburn and her co-workers isolated her by, for example, not talking to her. Wilburn, Benjamin, and other members of the EAD staff testified at the EEOC in Baltimore, Maryland in August 2002. Thereafter, in September 2002 Sherri Carroll ("Carroll") and the Agency proposed that Benjamin be suspended for five-days, contending that she had disobeyed orders to provide information as to the year-end pending actions she had on her desk. Contrary to the Agency's allegations, Benjamin maintained that she had been providing updates to her employer. Benjamin filed another EEO complaint as a result of the suspension, and that case was heard before the EEOC in a subsequent hearing on March 5 & 6, 2003 and June 17, 2003.

B. THE EMPLOYMENT ISSUES GIVING RISE TO THE INSTANT PROCEEDING

a. The Letter of Reprimand

On or about March 15, 2001, Benjamin's supervisor, Wilburn, had left a Performance Plan on Benjamin's office chair with a note asking that she

return it to him. Benjamin says that she returned the Performance Plan to Wilburn on three separate occasions, each time by leaving it in the in-box of Wilburn's executive assistant, Deadra Perry ("Perry"). App. at 18a. Nonetheless, Wilburn maintains he never received the Performance Plan from Benjamin. In any event, it was not uncommon for EAD employees to use the in-box as a means of giving documentation to Wilburn. Furthermore, Benjamin had been directed to use Wilburn's box as a means to leave documents for Wilburn. In any event, Benjamin told Wilburn that she had left the Performance Plan in his in-box, but Wilburn was apparently not concerned about it at the time. Notwithstanding the fact that Benjamin left the Performance Plan with Wilburn on three separate occasions, on or about April 4, 2001, Wilburn gave Benjamin a Letter of Reprimand, alleging that Benjamin failed to return the Performance Plan. App. at 19a

b. The Denial of Overtime

Benjamin also maintains that her employer discriminated against her on the basis of her age, sex (and in reprisal for protected activity) when Wilburn denied her request for 91 hours of overtime. In early May 2001, Wilburn gave Benjamin a project (i.e. a "Congressional Report") to complete. The process of preparing this report is relatively labor-intensive, and involves obtaining budget data for universities and other entities who have grants with the USDA. The report typically takes several weeks to complete. Nonetheless, Benjamin had done the report in 2000 and 2001, and she was able to complete the Report

in a timely manner. According to Benjamin, at the time Wilburn gave the report to Benjamin in early May 2001, he authorized Benjamin to use her credit time and then she could use overtime. There is evidence that the there were deadlines to complete the report and that the Budget Office wanted the Congressional Report immediately. Benjamin ultimately completed the report. In order to complete the Congressional Report, Benjamin worked her regular 40-hour workweek. In Pay Period 9 (i.e. from May 6, 2001 to May 19, 2001), Benjamin worked 19 hours of overtime. In Pay Period 10 (i.e. from May 20, 2001 to June 2, 2001), Benjamin worked 91 hours of overtime. In order to complete the Report, Benjamin worked nights and weekends – sometimes even working until 10:00 or 11:00 p.m.

It is undisputed that Benjamin submitted her claim for 91 hours of overtime for Pay Period 10, and that Wilburn denied this request. Contrary to Benjamin's claims, Wilburn maintains that he did not authorize the overtime in advance. The Report required a voluminous amount of labor; yet, Wilburn refused to compensate Benjamin for the time expended on it.

c. Hostile Working Environment in Reprisal for EEO activity

In the instant case, Benjamin also maintains that she was subjected to ongoing harassment which amounted to a hostile working environment in reprisal for her EEO activity. This harassment began after Benjamin filed her EEO Complaint

against Wilburn. According to Benjamin, Wilburn personally conducted a campaign of harassment and retaliation against her. In addition, a reasonable inference from the facts in the record is that Wilburn encouraged his subordinates to harass Benjamin.

By way of background, Benjamin filed an EEO complaint (naming Wilburn as the responding official) arising out of a verbal disagreement between Benjamin and her co-worker, Kim Hicks ("Hicks"). After this incident, Wilburn met with Hicks and Benjamin and gave each of them a Letter of Warning. Shortly after receipt of the Letter of Warning, Benjamin filed an informal EEO Complaint against Wilburn, contending, *inter alia*, that she was subjected to harassment, workplace violence and a hostile working environment. Benjamin's position is that Wilburn retaliated against her after she filed the EEO Complaint on September 11, 2000.

It is interesting to note that nearly all EAD employees said that there was a change in the manner that Wilburn treated Benjamin from the time she first came into the Extramural Agreements Section in 1998. This change in the way Benjamin was treated is central to her case. It shows that Wilburn did indeed develop a hostile and retaliatory motive towards Benjamin after she filed her first EEO complaint naming Wilburn as a responding official. It is also significant that EAD employees generally agree that the change in Wilburn's treatment of Benjamin began in the year 2000.

Hicks corroborates elements of Benjamin's claims that Wilburn (and the EAD staff) retaliated

against Benjamin for engaging in EEO activity. Although she does not specifically relate the change in behavior to the EEO activity, Hicks says that the relationship between Wilburn and Benjamin changed over time. She said that initially their relationship was polite and cordial. In addition, she says that the change in the relationship began at the time of the "argument" between Hicks and Benjamin. Given that Benjamin filed her EEO Complaint shortly after the "argument", Hicks' testimony corroborates the claim that the harassment was in retaliation for engaging in protected activity.

d. The Five-Day Suspension

In the case at bar, Benjamin alleges that the Agency suspended her for five days in November 2002 in reprisal for her EEO Activity. Wilburn and the Agency maintain that they suspended Benjamin because she had purportedly failed to update her supervisors on her pending actions (i.e. pending cases or agreements on her desk or under her control). Benjamin, on the other hand, maintains that she provided her supervisors with a list of pending actions on or about August 15, 2002. According to Benjamin, she gave a list to Carroll and Wilburn. On or about September 19, 2002, Benjamin provided another updated list of her pending actions to her supervisors. On or about September 26, 2002, Carroll called a meeting of all the specialists. At the meeting, Carroll asked Benjamin to bring her folders into Carroll's office. Benjamin was perplexed by the inquiries because he had already provided her supervisors with a list of

her pending actions. Also, Carroll's demeanor towards Benjamin was hostile and yelled at her. Notwithstanding the fact that: (a) Benjamin had already provided her supervisors with a list of all her pending actions; and (b) Benjamin invited Carroll to come to her desk on September 27, 2002, the Agency suspended Benjamin from her employment.

C. THE DISTRICT COURT PROCEEDINGS

The Petitioner filed suit in the District Court for the District of Columbia. The USDA filed a motion to dismiss for improper venue, and the case was ultimately transferred to the United States District Court for the District of Maryland. App. at 3a. The Agency filed a Motion for Summary Judgment. The Agency argued as follows: (1) the Letter of Reprimand did not constitute an adverse employment action; (2) the plaintiff could not establish a prima facie case of age and gender discrimination with regard to the denial of overtime issue; (3) the plaintiff could not prove a prima facie case of age and gender discrimination with respect to the five-day suspension; (4) the Agency had articulated legitimate, non-discriminatory reasons for the reprimand, denial of overtime and suspension; (5) the claims of a hostile work environment were not sufficiently severe or pervasive, nor were they based upon gender, age or reprisal.

In her Opposition, Benjamin argued as follows: (1) that there was direct evidence in the record of an intent to retaliate, including statements from the supervisor as well as testimony from co-workers corroborating that the supervisor began to

treat Benjamin differently after she had filed her case; (2) that the adverse employment actions – the Letter of Reprimand, denial of overtime and five-day suspension – are all inter-related to the hostile work environment; (3) that the Letter of Reprimand was not justified because she returned the performance plan; (4) that the employer should have paid her overtime because it had been approved by the supervisor; (5) that the suspension was not justified because she had complied with her supervisor's requests for information; (6) that the supervisor and co-workers made mean comments to her; yelled at her; refused to invite her to office gatherings; while all the while her performance ratings were at least Fully Successful.

The district court held a hearing on the motion for summary judgment on January 30, 2006. App. at 3a, 54a. The district court said that the employer had stated legitimate non-discriminatory reasons for its employment action. The district court also said that there was no causal nexus between the protected activity (on the one hand) and the adverse employment action (on the other). The court granted the USDA's motion for summary judgment. App. at 3a, 54a.

D. THE APPELLATE PROCEEDINGS

Benjamin filed an appeal to the Fourth Circuit alleging that there were material facts in dispute and for that reason, summary judgment should have been denied. The USDA reiterated its arguments from the district court. No oral argument was held. The Fourth Circuit issued a per curiam opinion affirming the district court for the reasons stated by

the district court. App. at 1a. Benjamin filed a timely motion for rehearing which was likewise denied. App. at 52a.

REASONS FOR GRANTING THE PETITION

A. THE FOURTH CIRCUIT ERRED IN AFFIRMING THE SUMMARY JUDGMENT BECAUSE THERE ARE MATERIAL FACTS IN DISPUTE

Pursuant to the provisions of Rule 14 of the Supreme Court Rules of Procedure, Adeline Benjamin, the Petitioner herein, respectfully requests this Court to grant a Writ of Certiorari in the instant case. This case arises from an appeal of the district court's decision, granting the Agency's motion for summary judgment. In granting summary judgment, this Court has said: "trial courts should not treat discrimination differently from other ultimate question of fact." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (1993). In the case at bar, the Petitioner respectfully avers that the Fourth Circuit's opinion overlooked certain legal and factual issues. Specifically, in the instant appeal, Petitioner has raised the issue of a hostile work environment in retaliation for her EEO activity. The Fourth Circuit's Opinion stated simply: "we affirm for the reasons stated by the district court on January 30, 2006." However, in issuing its oral decision, *the district court did not expressly address the hostile work environment claim.* App. at 54a. The issue of harassment was raised in the plaintiff's Complaint; it was briefed by both parties, both at the district

court and in the Fourth Circuit. Therefore, the Petitioner respectfully avers that the lower courts did not address the hostile work environment issue. In fairness, Benjamin is entitled to appellate review of her harassment/hostile work environment claim.

In addition to the foregoing, neither the Fourth Circuit nor the district court identified those material facts that were not in dispute. Given that this appeal arises from a decision granting the Agency's motion for summary judgment, the courts were obligated to make a finding that there were no material facts in dispute under Federal Rule of Civil Procedure 56. In April 2002, Wilburn gave Benjamin a Letter of Reprimand, contending that Benjamin had not returned the Plan. Benjamin maintains that she returned the Performance Plan. This is a dispute of material fact. However, the district court made a finding that "the defendant has not – did not sign and date the performance plan as acceptable or in writing. That really appears to be largely without objection." App. at 58a. Essentially, the district court made a finding of fact even though the issue was disputed and required a credibility determination. The Fourth Circuit's March 8, 2007 decision likewise fails to indicate what material facts are not in dispute. App. at 54a.

Another issue in this case is the propriety of a five-day suspension. In September 2002, the Agency gave Benjamin a five-day suspension, saying that she had failed to provide information on year-end pending actions. Contrary to the Agency's contentions, Benjamin maintains that she did in fact provide her supervisor with the requested

information, and she provided documentary evidence in support of this contention. In addition, in its decision the district court essentially made a finding that Benjamin had not complied with her supervisor's request and that the Agency was justified in disciplining her. Given that Benjamin's version of what happened is directly contrary to the Agency's version, only a trial can resolve these differences. Indeed, a jury trial must be held to weigh credibility in light of the demeanor of the witnesses, the documents that are introduced, etc.

Benjamin respectfully avers that all the issues before the district court on summary judgment were disputed by Benjamin's testimony. Indeed, a court cannot make a credibility assessment on motion. Therefore, the Fourth Circuit Court of Appeals was in error in affirming the district court's decision granting summary judgment. In the instant case, there is direct evidence of an intention to retaliate against Benjamin for engaging in protected activity. Specifically, Benjamin's underlying EEO claims were premised on reprisal. According to Benjamin, her supervisor, Curtis Wilburn, told her that, if she filed an EEO Complaint, he would know about it before the ink dried and it would damage her career. Benjamin says that Wilburn referred to her as a "liability" in the Extramural Agreements Division; and that he (Wilburn) would destroy her professionally. Benjamin testified that Wilburn told her that she would be "out of here". Benjamin also overheard Wilburn and her co-workers discussing when Benjamin would be removed from EAD. After Benjamin filed her first EEO Complaint in September 2000, Benjamin says that her workload

changed; that Wilburn would ignore her; and that Wilburn treated her differently than Bruce Lee, Calvin Jacobs and other employees in the same office. For example, other employees were able to walk into Wilburn's office to discuss matters whereas Benjamin was not. It should be noted that Benjamin kept detailed notes regarding the remarks that Wilburn (and the other co-workers) made to and about her. Also, Wilburn's executive assistant, Deadra Perry, said that Wilburn and Benjamin communicated just fine but "when the case came along, they stopped communicating". The evidence shows that Wilburn did indeed change the manner he treated Benjamin as a result of the EEO filing.

B. THE PETITIONER MAINTAINS THAT THERE IS DIRECT EVIDENCE OF AN INTENT TO RETALIATE AGAINST HER BASED UPON HER PROTECTED ACTIVITY

This case raises legal issues as to what actually constitutes direct evidence of reprisal. Historically, there was a dispute among the respective federal courts of appeals as to what constitutes direct' evidence of discrimination. In *Desert Palace, Inc. d/b/a Caesars Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003), the United States Supreme Court attempted to clarify the confusion that arose in the wake of the Supreme Court decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). Specifically, following *Price Waterhouse*, there was a split of authority among the federal circuit courts as to when the mixed motive analysis

applies under 42 U.S.C. § 2000e-2(m) (i.e. the 1991 Civil Rights Act). In *Desert Palace*, this Court said that the 1991 Civil Rights Act does not require a plaintiff to produce direct evidence:

> [The statute] unambiguously states that a plaintiff need only demonstrate that an employer used a forbidden consideration with respect to "any employment practice". On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.
>
> 123 S. Ct. at 2154-2155

This Court went on to state that a plaintiff may obtain a mixed motive instruction through either direct or circumstantial evidence. Notwithstanding the *Desert Palace* decision, there is still uncertainty in the present state of the law:

> Retaliation claims arise out of a separate provision in Title VII which makes it an "unlawful employment practice" for an employer to discriminate against an employee because that employee "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter. ... In

> interpreting *Desert Palace*, one commentator noted that it was an unsettled issue as to whether the decision would be held applicable to ADEA, retaliation and other cases which are not directly impacted by the language in 2000e-2(m). *Warren v. Terex Corporation*, 328 F. Supp. 2d 641, 643 (2004).

If the writ of certiorari is granted in the instant case, the United States Supreme Court will be afforded the opportunity to clarify this issue. In passing the 1991 Civil Rights Act, Congress did not amend the statute with respect to reprisal claims. Thus, there is confusion as to whether a plaintiff – alleging direct evidence of reprisal – may proceed under the more generous mixed motive evidentiary framework.

Petitioner maintains that she has produced direct evidence of an intent to retaliate and that the lower courts should not have applied the traditional *McDonnell Douglas* burden shifting test in analyzing this case. Thus, this case raises the question as to the manner that the evidence should have been analyzed. A little historical background is necessary to understand this point. Prior to the Supreme Court's decision in *Desert Palace*, there were at least three (3) competing views as to what constitutes direct evidence of discrimination. The first view was called the "animus view" as detailed in the Fourth Circuit case of *Taylor v. Virginia Union University*, 193 F.3d 219 (4th Cir. 1999). *Taylor* involved a lawsuit filed by two campus police officers at

Virginia Union University. Co-plaintiff Taylor alleged, in part, that she was discriminated against on the basis of her gender because she was not selected for the police academy. According to the plaintiff, one of the responding officials - Chief Wells – had made a comment to the effect that he would never send a female to the police academy. This remark was made to another individual and not directly to plaintiff Taylor. The Fourth Circuit said that Ms. Taylor did not qualify for the mixed motive standard; therefore, the Fourth Circuit analyzed the case under the *McDonnell Douglas* burden shifting proof scheme. *Id* at 232-233 Specifically, the Fourth Circuit said that a plaintiff may qualify for the more generous standard of liability in mixed motive cases if the plaintiff "presents direct evidence that decision makers placed a substantial negative reliance on an illegitimate criterion." *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995), quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). Such a showing requires "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear direction on the contested employment decision." Id. If the plaintiff meets that burden, then the burden shifts to the employer to show that it would have reached the same decision absent discriminatory animus. In *Taylor*, the Fourth Circuit did not apply the more generous mixed motive standard in resolving the plaintiff's claims because Wells' statement was made to a third party (Lt. Terry) and thus, it did not directly address the employment action at issue (i.e. Taylor not going to the police academy). There are other appellate courts who have adopted the "animus view", such as

the D.C. Court of Appeals in *Thomas v. NFLPA*, 131 F.3d 198 (DC Cir. 1997)

The second view that had developed in analyzing whether the mixed motive analysis applies was called the classic view, as spelled out by the Fifth Circuit in *Nichols v. Loral Vought*, 81 F.3d 38 (5th Cir. 1996). The plaintiff alleged that a supervisor said that she was the supervisor because she was younger than the plaintiff-employee. These statements had been made on five to six occasions over three and-one-half years. The Fifth Circuit said that direct evidence of discrimination is such evidence "without any inferences or presumptions." *Id* at 41. In *Nichols*, the Fifth Circuit said that an employer's statements were "stray remarks" and did not constitute direct evidence of discrimination.

Similarly, in *Shorter v. ICG Holdings*, 188 F.3d 1204 (10th Cir. 1999), the Tenth Circuit also adopted the classic view as it applies to mixed motive cases. In *Shorter*, the employer filed suit following his termination. There was evidence that, after the termination, the supervisor referred to plaintiff as an "incompetent nigger". The Tenth Circuit said that the plaintiff had failed to offer direct evidence of discrimination. Specifically, the cited statement was one of personal bias or opinion and did not have a direct relationship to the removal action. Also, the Tenth Circuit said that the plaintiff was not entitled to mixed motive burden of proof because he had not produced "direct evidence" of discrimination.

The third view that developed among the federal circuit courts in mixed motive cases was

more of a mixed bag. For example, in *Henesssy v. Peril Datacom Networks*, 69 F.3d 1344 (7th Cir. 1995), the plaintiff filed suit alleging gender discrimination. The plaintiff was a sales representative, and the employer terminated her upon her return from pregnancy leave. In *Henessy*, the Seventh Circuit said that the district court had correctly applied the mixed motive jury instruction and not the traditional *McDonnel Douglas* framework. Specifically, the Seventh Circuit said that this case contained a "mixed bag" of direct and indirect evidence that made it appropriate to permit the plaintiff to prove intentional discrimination through direct evidence. The supervisor had had said that he did not like to hire women in the field because they get pregnant. Also, plaintiff ranked second out of four employees in sales performance. There was also evidence that the plaintiff was the only female sales representative, and that the employer replaced plaintiff with a male employee.

In *Lightfoot v. Union Carbide*, 110 F.3d 898 (2d Cir. 1997), the Second Circuit adopted a view that "direct evidence . . . includes conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude." In addition, in *Wright v. Southland Corporation*, 187 F.3d 1287 (11th Cir. 1999), the Eleventh Circuit commented on the type of evidence that is necessary to trigger the mixed motive analysis:

> [A]n examination of our cases in which we held that the plaintiff had "direct evidence" of improper discrimination

> shows that the term was not used in its traditional sense as evidence that, if believed, proves the existence of a fact in issue without inference or presumption . . . . . Rather the cases are more consistent with a definition of direct evidence as evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic. Id. at 1298

The bottom line is that the district court analyzed Benjamin's case utilizing the *McDonnell Douglas* analytical framework. The Petitioner contends that this was erroneous because she had introduced direct evidence of retaliation. However, the question remains as to what constitutes direct evidence in reprisal cases; does the *Desert Palace* analysis apply, or does a plaintiff has a different evidentiary burden in reprisal cases?

CONCLUSION

As the foregoing demonstrates, in the case *sub judice*, Benjamin maintains that there is direct evidence of retaliation. If this Court grants certiorari, the Court will be afforded the opportunity to: (1) clarify the law as to what quantum of evidence is necessary to qualify for the mixed motive analysis in cases involving retaliation and age discrimination; and (2) expound on the law as to when summary judgment may properly be granted in employment discrimination cases where there are material facts are in dispute.

WHEREFORE, the premises considered, your Petitioner prays that this Court grant the Writ of Certiorari.

/s/ Richard J. Link
RICHARD J. LINK
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(301) 495-0070

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1280

ADELINE B. BENJAMIN,

Plaintiff - Appellant,

versus

ANN VENEMAN, Secretary, United States Department of Agriculture,

Defendant - Appellee.

[Entered March 8, 2007]

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, District Judge. (8:05-cv-00175-PJM)

Submitted: February 14, 2007
Decided: March 8, 2007

Before WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Curtis J. Karpel, Richard J. Link, Jr., KARPEL & LINK, Silver Spring, Maryland, for Appellant. Rod J. Rosenstein, United States Attorney, Ariana W. Arnold, UNITED STATES ATTORNEY'S OFFICE, Baltimore, Maryland, for Appellee.
Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Adeline B. Benjamin appeals the district court's order granting summary judgment in favor of her employer, the U.S. Department of Agriculture, on her claims of retaliation and hostile work environment brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (2000). Summary judgment is appropriate only if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 958 (4th Cir. 1996); We have thoroughly reviewed the briefs and joint appendix and find no reversible error. Accordingly, we affirm for the reasons stated by the district court on January 30, 2006. (JA 1758-1770). Benjamin v. Veneman, No. 8:05-cv-00175-PJM (D. Md. Jan. 31, 2006). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decision making process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ADELINE B. BENJAMIN

Plaintiff,

v. Civil Action No. PJM 05-175

ANNE M. VENEMAN,
Secretary, U.S. Dept. of Agriculture

Defendant.

FINAL ORDER OF JUDGEMENT

[Entered January 31, 2006]

The Court held a hearing and ruled on pending motions. Accordingly, it is, for reasons stated on record this 30th day of January, 2006 ORDERED:

1) Defendant's Motion for Summary [Paper No. 20] is GRANTED;

2) Defendant's Motion to Dismiss [Paper No. 20] is MOOT;

3) Final Judgment is ENTERED in favor of Defendant Ann M. Veneman and against Plaintiff Adeline B. Benjamin; and

4) The Clerk SHALL CLOSE this case.

/s/
PETER J. MESSITTE UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADELINE B. BENJAMIN,

Plaintiff,

v. **Civil Action No. 03-2854 (RJL)**

ANNE M. VENEMAN,
Secretary, U.S. Department of Agriculture

Defendants.

MEMORANDUM OPINION AND ORDER
(January 9th, 2005) [#8, 9]

[Entered January 10, 2005]

Before the Court is Defendant's motion to dismiss or, in the alternative, to transfer the current action. The Defendant, Ann M. Veneman, U.S. Secretary of Agriculture, moves for dismissal of the action for improper venue under Federal Rule of Civil Procedure 12(b)(3). FED. R. CIV. P. 12(b)(3). In the alternative, the Defendant moves for the Court to transfer this action because, under the special venue provision governing Title VII actions, 42 U.S.C. § 2000e-5(f)(3), the District of Columbia is an improper venue for this action. For the following reasons, the Court GRANTS the Defendant's

morion to transfer. The Court DENIES as moot the Defendant's motion to dismiss this action.

The Plaintiff, Adeline B. Benjamin, brings this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (1964) *et seq;* and the Age Discrimination in Employment Act of 1967 ("ADEA"), 28 U.S.C. §§ 621 *et seq.,* for intentional discrimination based on sex, age and reprisal for prior Equal Employment Organization ("EEO") activity. Compl. ¶¶ 3, 10. As such, her claims are subject to the special venue requirements of 42 U.S.C. § 2000e-5(f)(3), which provides that Title VII actions maybe brought: (1) in any judicial district in the state in which the unlawful employment practice is alleged to have been committed; (2) in the judicial district in which relevant employment records are maintained and administered; and (3) in the judicial district where the aggrieved party would have worked but for the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(f)(3); *see also Donnell v. Nat'I Guard Bureau,* 568 F. Supp. 93, 94 (D.D.C. 1983). In the event that a defendant may not be located in any of the three preferred judicial districts, section 2000e-5(f)(3) provides that an action maybe brought in the judicial district in which the defendant has its principal office. 42 U.S.C. § 2000e-5(f)(3).

In this case, the Plaintiffs claims arise out of alleged discrimination based on sex, age and reprisal while she was employed as a member of the Administrative and Financial Management at the United States Department of Agriculture ("USDA"), in Beltsville, Maryland. Compl. ¶¶ *6,* 10; *see also*

Ex. 1 ¶ 5 (David Love Decl.). The Plaintiffs employment records are also maintained and administered in Maryland. Ex. 1 ¶ 5. The location of Plaintiff's employment and of her employment records is undisputed. There is no indication in the record that the Plaintiff would have worked in a district other than Maryland if not for the alleged discrimination. *See* Compl. *passim; accord* Ex. 1 ¶¶ 5, 7. Furthermore, because it is undisputed that there are USDA offices in Beltsville, Maryland, the provision of section 2000e-5(f)(3) regarding a defendant's "principle place of business" is inapplicable. Compl. ¶ 6; *see also* Ex. 1 ¶ 4. Accordingly, the Court finds that the District of Maryland is the appropriate venue for the Title VII claims. 42 U.S.C. § 2000e-5(f)(3); *see also Stebbins v. State Farm Mut. Auto Ins. Co.*, 413 F.2d 1100, 1102-03 (D.C. Cir. 1969).

Finally, with respect to the Plaintiffs ADEA claims, section 1391(e) of Title 28 provides proper venue for these claims in any judicial district in which: (1) the defendant in the action resides; (2) a substantial part of the events or omissions giving rise to the claim occurred; or (3) the plaintiff resides. 28 U.S.C. § 1391(e). Thus, venue is proper for the ADEA claims in either Maryland or the District of Columbia. Compl. ¶¶ 1, 4, 6. In the interest of judicial efficiency, and to maintain the Plaintiffs claims in one action, the Court GRANTS the motion to transfer all of the Plaintiffs claims to the District of Maryland and, accordingly, the Court DENIES as moot the motion to dismiss the action.

ORDER

For the reasons set forth above, it is this 9th day of January, 2005 hereby

ORDERED that the Defendant's motion to dismiss [#8] is DENIED as moot and it is further

ORDERED that the Defendant's motion to transfer [#9] is GRANTED; and it is further

ORDERED that the above captioned action shall be transferred to the U.S. District Court for the District of Maryland.

SO ORDERED

/s/
RICHARD J. LEON
United States District Judge

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201

ADELINE B. BENJAMIN
11222 Cherry Hill Road, #302
Beltsville, MD 20705

COMPLAINANT

v.

ANN M. VENEMAN, SECRETARY
U.S. DEPARTMENT OF AGRICULTURE
ATTN: Chief, Employment Adjudication
Division/Office of Civil Rights
1400 Independence Avenue, SW
Washington, D.C. 20250-9440

AGENCY

EEOC CASE NO.:
120-2002-01245X

AGENCY CASE NO.:
010576
010703

DECISION

[Entered: September 23, 2003]

APPEARANCES:

COMPLAINANT'S REPRESENTATIVE:

Curtis J. Karpel, Esquire
Richard J. Link, Esquire
8601 Georgia Avenue, Suite 905
Silver Spring, MD 20910

AGENCY'S REPRESENTATIVE:

Charles Byrd, Jr, Esquire
S&H CONSULTING, LLC
2518 Maryland Avenue
Baltimore, MD 21218

BEFORE:

LINDA A. KINCAID
ADMINISTRATIVE JUDGE

I. INTRODUCTION

This matter came before the United States Equal Opportunity Commission (EEOC) pursuant to Section 717 of the Civil Rights Act of 1964, as amended. The procedural requirements provided in the implementing regulations at 29 C.F.R. Section 1614.101 *et seq.* have been completed.

An EEOC Hearing was held at the EEOC Baltimore District Office on August 14 and 15, 2002, on the first two issues noted below. In November, 2002, the parties requested a stay in the rendering of

a Decision, amendment of the case, and the reopening of the EEOC Hearing to hear like and related issues, i.e. the last two issues noted below. The parties' requests were GRANTED. On March 5 and 6, 2003 and June 17, 2003, after a brief period of discovery, the EEOC Hearing on the last issues was held at the EEOC Baltimore District Office. Closing briefs were received from the Complainant on October 1, 2002, and July 28, 2003. Closing briefs were received from the Agency on October 3, 2002, and July 28, 2003. All are considered timely.

II. ISSUES

1. Did the U.S. Department of Agriculture, Agency, unlawfully discriminate against Adeline B. Benjamin, Complainant, on the bases of age, sex and/or reprisal for prior EEO activity when: (a) she was issued a Letter of Reprimand in April 2001; and (b) she was denied pay for 91 hours of overtime worked in May 2001?[1]

2. Did the Agency unlawfully discriminate against Complainant, on the bases of age, sex and/or reprisal for prior EEO activity, when she was

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[1] For having failed to follow EEOC Orders about presenting compensatory damages claims with specificity in her Prehearing Statement, Complainant was barred from seeking them in regard to this issue.

harassed, thereby creating a hostile work environment in 2001?[2]

3. Did the Agency unlawfully discriminate against Complainant in reprisal for prior EEO activity when she was issued and served a 5-day Suspension in November 2002?

4. Did the Agency unlawfully discriminate against Complainant in reprisal for prior EEO activity when she was harassed, thereby creating a hostile work environment during 2002?

III. CONCLUSION

Based on the evidence of record, as well as the findings of fact and conclusions of law set forth below, Complainant failed to prove, by a preponderance of the evidence, that the Agency unlawfully discriminated against her based on age, sex or reprisal when she was issued a Letter of Reprimand in April 2001 and when she was denied payment for 91 hours of overtime worked in May 2001.

Based on the evidence of record, as well as the findings of fact and conclusions of law set forth

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[2] The Agency had originally dismissed this claim of harassment. However, after hearing the testimony of witnesses, there was sufficient basis to reinstate this allegation. Both attorneys were directed to brief this issue in their Closing Arguments after the first two days of hearing, as well as the first issue stated above.

below. Complainant failed to prove, by a preponderance of the evidence, that the Agency unlawfully, discriminated against her based on age, sex or reprisal when she was allegedly harassed and a victim of a hostile work environment in 2001.

Based on the evidence of record, as well as the findings of fact and conclusions of law set forth below, Complainant failed to prove, by a preponderance of the evidence, that the Agency unlawfully discriminated against her based on reprisal when she was issued and served a 5-day Suspension in November 2002.

Based on the evidence of record, as well as the findings of fact and conclusions of law set forth below. Complainant failed to prove, by a preponderance of the evidence, that the Agency unlawfully discriminated against her based on reprisal when she was allegedly harassed and a victim of a hostile work environment during 2002.

IV. FINDINGS OF FACT[3]

1. At the time of the matter giving rise to these complaints, Adeline Benjamin, Complainant, was employed by the U.S. Department of the Agriculture, Agency, as a Grants and Agreements Specialist, GS-1101-12, on the

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[3] REFERENCE CODES:

I.F. – Investigative File
H.T. – Hearing Transcript
Ex. – Exhibit
Aff. – Affidavit

Grants and Agreements Management Staff, Extramural Agreements Division (EAD), Administrative and Financial Management in the Headquarters of the Agricultural Research Service (ARS) in Beltsville, Maryland. Complainant's duties included providing operational support and advice to Library personnel in other regions. I.F., Ex. F-2.

2. Complainant was born on June 28, 1954. Therefore, in the period at issue, April 2001-2002, she was a 46-48 year-old female employee of the Agency. See I.F., Ex. F-1a.

3. In the early 1990's, Complainant had filed two EEO complaints. In those complaints, which were filed prior to Complainant working in EAD, she had not named her current supervisors.

4. In September 2000, Complainant filed an EEO complaint alleging a hostile work environment regarding a Letter of Warning issued to her in connection with a July 2000 confrontation with her co-worker, Kim Hicks (DOB: May 6, 1967, female), a GS-1101-12, Grants and Agreements Specialist.[4] Hicks and Complainant had received the Letters of Warning for the incident from Curtis Wilburn, Jr. (DOB: May 11, 1958, male), EAD Director, GS-1101-15. I.F., Ex. F-12. Hicks recalled, as

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[4] Hicks and Complainant knew each other before Complainant was hired in EAD. While on a review assignment to the area where Complainant worked previously, Hicks had criticized work done by the Complainant.

did Wilburn, that both employees were handed the Letters by Wilburn. Complainant refused to sign the Letter when it was received. H.T., pp. 318-322, 414-19, 425-428. Complainant claimed that she never received a Letter of Warning from Wilburn.

5. During the period at issue, 2001-2002, Complainant was directly supervised by Wilburn. He had become EAD Director in October 1999. Prior to that he had served as the Program Manager/Deputy Director of EAD. In that capacity, he had recommended Complainant for a position within EAD and had advised her of the vacancy.

6. During this period, Complainant's EAD co-workers included: Christina Getachew[5] (DOB: January 16, 1960, female), GS-1101-13, Grants and Agreements Specialist; Bruce Lee[6] (age unknown, male), Program Manager; Calvin Jacobs (age unknown, male), part-time student Intern; Deadre Perry[7] (DOB: August 2, 1961, female), EAD Executive Assistant;

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[5] After being on leave since January 2001, Getachew retired from EAD on a Disability Retirement in October 2001. H.T., pp. 192-193, 204.

[6] Lee was on extended sick leave from October 2000 onward. He was not present in EAD at any time during the events at issue.

[7] Perry worked as EAD Executive Assistant from 1995 until January 2002 when she was promoted to the position of Extramural Agreements Specialist. H.T., pp. 228-231.

Sherri Carroll[8] (DOB: December 30, 1958, female), GS-12, Grants and Agreements Specialist; Kim Hicks[9]; and other females. Most employees were hired and/or promoted by Wilburn; some female employees were hired/promoted within the period at issue.

7. Wilburn gave Complainant a Certificate of Merit and a cash award for work performed during the period November 1, 1999–December 31, 2000.

8. Wilburn rated Complainant Superior on her annual Performance Appraisals for 2000 and 2001. He also gave her a $1,250 and then a $1,350 performance award. Complainant refused to sign either Performance Appraisal.

9. For the period July 1–September 27, 2001, Wilburn gave Complainant an Award Certificate for Outstanding work.

10 Complainant sought EEO counseling in April and June 2001 and in October 2002. She filed formal EEO complaints in June and August

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[8] Wilburn promoted Carroll after she applied for a vacancy that Wilburn had announced during an BAD staff meeting. Carroll recalled Complainant being at staff meetings. She also noted that she and Complainant had been offered temporary promotions on a rotational basis into Bruce Lee's position while he was out on extended leave. Complainant refused the GS-13 temporary promotion. Carroll accepted the assignment. H.T., pp. 268-272.

[9] Wilburn promoted Hicks from GS-12 to GS-13 in October 2001.

2001 and sought amendment of this complaint to include 2002 issues by filing a Motion to Amend in November 2002, which was Granted.[10]

11. In support of Complainant's age discrimination claim, she noted that, on occasion, Wilburn inquired about her age. He also compared her to a radio show character and called her "country". H.T., pp. 58-59. No other employee corroborated this recollection which was denied or put into context by Wilburn to show its "joking" nature.

12. In support of her sex discrimination claim, Complainant noted that Wilburn and others occasionally spoke to her about clothes and accessories. Several employees testified that Complainant was often complimented about her professional appearance.

13. In March 2001, Wilburn called Complainant, Sherri Carroll, and Kim Hicks into his office to give them their Performance Plans for 2001.

14. Complainant could not be located and did not come to the office. The others came, signed

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[10] Although she did not raise the matter to an EEO counselor, and therefore it is not at issue, Complainant stated during the EEOC Hearing that she also was discriminated against by Wilburn when not promoted when Hicks and Carroll were promoted. Complainant, however, admitted that she never applied for either position to which Hicks and Carroll were promoted.

and dated their Plans and left them with Wilburn before leaving the office. H.T., pp. 324-338.

15. On or about March 15, 2001, Wilburn left Complainant's Plan on her chair with a note asking her to read, sign and date the Plan and return it. H.T., pp. 436-438.

16. In mid-March 2001, Wilburn sent Complainant an email. Again he asked her to return the Plan.

17. Complainant asserted that she signed, dated and returned the Plan twice – once before this email and again after the email. She recalled putting the copies in Wilburn's inbox.

18. After not having received the Plan from Complainant, Wilburn contacted Vicky Hanbury (DOB: January 17, 1952, female), Chief of the Employee Relations Branch, GS-201-14. She advised Wilburn to give Complainant a clear order directing her to sign, date and return the Plan.

19. On March 20, 2001, Wilburn sent Complainant an email ordering Complainant to return the Plan.

20. Complainant recalled copying the signed Plan again and putting this copy, as well, into Wilburn's inbox.

21. Complainant did not respond to Wilburn's emails.

22. Perry worked at a desk outside Wilburn's office and served as his secretary and time keeper. She credibly swore that Complainant never left the Plan in her custody or Wilburn's mail inbox within her area. She testified that in the past, Specialists have either handed her a signed Plan or left it in the inbox on her desk. I.F., Ex. 4.

23. Wilburn again consulted with Hanbury about this problem of Complainant's unresponsive. Hanbury advised Wilburn to issue.a Reprimand and drafted the Letter of Reprimand for him to sign and give to Complainant.

24. Based on the evidence and after assessing the credibility of the witnesses who testified in this matter, I conclude that Complainant never returned a signed Performance Plan to Wilburn. Even though Complainant testified that she returned a signed Plan three times, her unsupported testimony versus the contemporaneous written emails from Wilburn with no written response from Complainant and the uncontested fact that Complainant has not signed her Performance Appraisals in the past leads me to this conclusion. H.T., pp. 98-100, 103, 131-132.

25. On April 4, 2001, Wilburn issued Complainant a Letter of Reprimand for failing to follow

supervisory instructions to sign, date and return her Performance Plan for 2001 to him or respond to his communications requesting and directing her to do so. I.F., Ex. F-10.

26. On May 10, 2001, Wilburn assigned the work on the Congressional Report for 2001 to Complainant since she had done the Reports for 1999 and 2000, well. Complainant testified that, at that time, Wilburn told her that she was authorized the overtime necessary to complete the Report.

27. Later in May 2001, Complainant submitted her Time & Attendance Report (timecard) which noted that she worked 19 hours of overtime during pay period 9, occurring May 6-19, 2001. On May 23, 2001, as timekeeper reviewing the timecards for Wilburn's signature, Perry asked Wilburn if he had approved the payment for overtime that Complainant claimed she had already worked. Wilburn told Perry that he was approving the payment since the work probably was on the Congressional Report he had assigned to Complainant. I.F., Ex. F-13. Wilburn also approved 24 hours of credit time claimed by Complainant for this time period. I.F., Ex. F-2

28. However, in order to avoid future confusion about working overtime, Wilburn informed the Complainant in a May 23d email to her that policy and practice required an employee to seek approval of the dates for overtime one wanted to work before working it. This

practice was to allow managers to control the overtime, budget. He noted that he had not approved her overtime for pay period 9 before she worked the hours but would approve the payment after the fact this time. He advised her that future overtime must be approved in advance or she would not be paid.

29. In her affidavit taken during the EEO investigation. Complainant admitted receiving Wilburn's emails. I.F., Ex. F-2.

30. Although Complainant claimed that she responded to the emails verbally, I conclude that she did not respond to the emails, speak with Wilburn or Perry about the emails or overtime or seek approval for further overtime. H.T., p. 156.

31. Hicks and Perry testified that employees had been told by Wilburn, and all were aware, that in order to be paid for it, overtime had to be approved before one worked the hours.

32. On June 4, 2001, after the fact, Complainant requested payment for 91 hours of overtime she had worked during pay period 10 occurring May 20-June 2, 2001.

33. Wilburn denied the payment.

34. Subsequently, Complainant received a Certificate of Merit and a $350 cash award from Wilburn for her work on the Congressional Report.

35. During her testimony, Complainant reported hearing conversations in EAD office space about her EEO complaint, the first days of the EEOC Hearing, and about Wilburn getting rid of her. She also reported hearing derogatory comments about hr. During the second session of the EEOC Hearing, Complainant presented notes she had made in her calendar about these overheard conversations and about what co-workers thought about a settlement proposal they seemed to know had been made to Complainant. C.Ex. 16.

36. On September 26, 2002, Sherri Carroll, now GS-13, Grants and Agreements Analyst/Program Manager, and now Complainant's Team Leader/supervisor, sent an email to members of EAD, requesting their attendance at a staff meeting at 10:30 that morning. She told them to "Be prepared to discuss year end pending actions and plans to work overtime/credit time through September 30." See Attachments to Agency Motion to Amend.

37. Complainant attended the meeting with her co-workers and Carroll. During the meeting, each person was asked by Carroll to report on their pending actions. All, but Complainant, responded with a summary of pending actions. Complainant stated that she did not need overtime or credit time or assistance to finish the work. She provided no details about her pending work. She told Carroll that she was very busy and could not spend time listing the

work remaining and that Carroll could come to Complainant's cubicle to look at the folders to see the work remaining to be done. Complainant stated during the Hearing and in her calendar notes for this date that she felt "singled out" during the meeting. She observed in her calendar notes about the meeting that "Sherri became irate." C.Ex. 16.

38. Complainant testified that such detail was never required previously. She also spoke of reports she regularly sent to Wilburn about the status of her work. C.Exs. 1-7.

39. Early on September 27, 2002, Carroll sent Complainant an email requesting that, by noon on September 27th, Complainant provide her with the number of new agreements not yet sent to cooperators for signature and the number of amendments not yet sent to cooperators for signature. Carroll stated that the information was needed in order to arrange for staff assistance with the workload. See Attachments to Agency Motion to Amend. Complainant testified that she never received this email.

40. At 4:00 p.m. on the 27th, Wilburn and Carroll met with Complainant and directed her to comply with Carroll's request for a list of pending actions remaining to be completed in the fiscal year. Complainant informed Wilburn that she was very busy and that Carroll or he could come to her cubicle, go through her desk and collect the information.

41. Following the meeting, Wilburn sent Complainant a Memorandum, via email and hard copy, directing her to submit a list of all pending actions to Carroll no later than 9:00 a.m. on Monday, the 30th of September. Wilburn noted in the memo that Complainant had not been prepared at the staff meeting and had been uncooperative. He noted that failure to comply might result in disciplinary action against her. See Attachments to Agency Motion to Amend.

42. On September 29th, Complainant worked till midnight.

43. On Monday, September 30, 2002, Complainant submitted to Wilburn the following letter, dated September 28th, which stated in part:

> On September 26, 2002, I was singled out in an Extramural Agreements Division staff meeting conducted by Ms. Carroll to compile a list of all actions on my desk. I apprized Ms. Carroll, due to time constraints, I did not have time to compile such a list due to the volume of FY 2002 actions remaining to be awarded by September 30. I invited Ms. Carroll along with the EAD personnel to come to my cubby and compile the data. Ms. Carroll replied in an irate tone of voice "I am not going to compile a list for you." Ms. Carroll further demanded that I transport all the files from my desk to her office.

On September 27, 2002 after my tour of duty, you ordered me to meet in Ms. Carroll's office without prior notification. I was belittled, humiliated, harassed and prohibited from performing my duties. These actions of Harassment [sic] and retaliation are a continuation of my pending EEO complaint.

Again I invited you and Ms. Carroll to my desk to compile a list. You both refused. I returned to my cubby and continued to process my year-end projects. You came to my cubby and placed the attached letter on my desk.

In conclusion, it is the practice of the Extramural Agreements Division to receive the year end processing report on October 1 of each year. You nor Ms. Carroll could not provide me with any regulations to sustain the urgent request.

See, Agency's Motion to Amend.

44. On September 30th, Wilburn met again with Complainant. He told her that since she had failed to comply with his previous directive, he was clearly now issuing a direct order to comply with Carroll's request for a list of pending actions. He informed Complainant that failure to do so would be considered insubordination and could result in disciplinary action. Wilburn recalled that during this meeting Complainant asked him

why he or Carroll could not come to her desk to collect the information.

45. At the conclusion of the September 30th meeting at 2:00 p.m., Wilburn attempted to give Complainant a Memorandum stating in writing what he had just told her. However, Complainant refused to accept it before she departed his office. A few minutes thereafter, Wilburn placed the memo on Complainant's desk. He informed Complainant that if she did not comply, he would collect the information himself.

46. Later that day, Wilburn and Carroll came to Complainant's desk and compiled a list of pending actions.

47. On October 4, 2002, Complainant responded by email to Wilburn. She stated that his September 30th letter was "an allowed continuation of Harassment [sic] and retaliation by Management." See, Agency Motion to Amend.

48. October 8, 2002, Wilburn called Complainant to his office to give her written notice proposing a five-calendar-day Suspension for refusing to comply with a supervisory instruction. Carroll, at Wilburn's request, was in the office to witness the delivery of the written notice. Complainant refused to accept the letter. She asked that her attorney be present. She left Wilburn's office after refusing to accept or sign the letter

acknowledging receiving it. See Complainant's confirmation of facts in calendar notes at C.Ex 16.

49. Wilburn then placed the letter of notification of the proposing the Suspension on Complainant's desk and had a copy mailed to Complainant's home. In the letter, Complainant was notified that she had a right to reply within 15 days to Jamem H. Bradley (age unknown, male), the Deputy Administrator of Administrative and Financial Management.

50. Wilburn also advised Complainant in the letter proposing the Suspension that she could avail herself of services available to employees in the Employee Assistance Program (EAP) or the Cooperative Resolution Program (CRP). He stated that if he. could be of assistance, he would participate in the CRP.

51. Complainant did not reply to the Letter proposing Suspension orally or in writing.

52. On October 30, 2002, Bradley's secretary came to Complainant's desk and scheduled a meeting for Complainant in Bradley's office the next morning. See C.Ex. 16.

53. Early on October 31st, Complainant phoned Bradley's office saying she would not come to the meeting. See C.Ex. 16.

54. On October 31, 2002, Bradley phoned Complainant to tell her to come to his office so he could present the letter of decision about the Suspension. At the time, Kathleen Antonelli, the Human Resource Specialist who had advised Wilburn and himself about this matter and drafted the letters for their signatures, was present in his office as a witness Complainant responded that she refused to come to the office to meet with Bradley without her counsel. Bradley then went by himself, leaving Antonelli in his office, to Complainant's desk to deliver the letter in a sealed envelope. Complainant refused to read the letter or accept it. Bradley testified that he left it on Complainant's desk. He had said to her that whether she took the letter or not she was suspended and should not come to work the next week or face further disciplinary action. At one point, he said: "Take the God Damn letter." See C.Ex. 16 and Bradley's testimony at the EEOC Hearing. The Notice of Suspension was also sent to Complainant by FedEx. See Antonelli Notes at A.Exs. 1 and 2.

55. The October 31, 2002, letter states in pertinent part: "This letter serves as my decision on your proposed 5-calendar-day Suspension from duty, without pay, from your position of Grants and Agreement Specialist ...." He noted that this was the second disciplinary offense for similar "misconduct" which she was informed would not be tolerated. The Suspension was effective

Monday, November 4, 2002, through Friday, November 8, 2002. In the letter, Bradley warned Complainant that "any future instances of any type of misconduct will neither be tolerated nor condoned and will result in more severe disciplinary action, up to and including your removal from the Federal service." Agency's Prehearing Statement,: Ex. 10.

56. Complainant became so upset during this period of time in 2002 that she called security to report workplace violence. She felt ridiculed, embarrassed and humiliated.

V. APPLICABLE LAW AND REGULATIONS

Title VII of the Civil Rights Act of 1954, as amended, provides, inter alia, that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11]

Section 704(a) of the Civil Rights Act of 1964, as amended, states in relevant part "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment,...because he has opposed any practice made an unlawful employment practice by the title, or because he has made a charge,

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[11] 42 U.S.C. § 2000e-2.

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."[12]

In discrimination cases brought pursuant to Title VII of the Civil Rights Act of 1964, the Complainant bears the burden to initially establish a prima facie case of discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). If a prima facie case is established, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged action. *Burdine* at 253-4; *McDonnell Douglas* at 802. Complainant may then show that the explanation offered by the Agency was not the true reason, but a mere pretext for intentional discrimination. *Burdine* at 256; *McDonnell Douglas* at 804.

It is not enough to disbelieve the employer's articulated reason. In addition, the fact finder must believe the Complainant's explanation of intentional discrimination. *St. Mary's Honor Center* v. *Hicks,* 509 U.S. 502 (1993). The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant. However, a prima facie case and sufficient evidence of the Agency's pretext may permit a finding of discrimination, even without additional, independent evidence of discrimination. Reeves v. *Sandersor. Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 2108-09

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12 42 U.S.C. § 2000e-3.

(June 12, 2000) (proof of prima facie case and pretext alone usually sufficient to support a trier of fact's belief that discrimination occurred).

Although *McDonnell Douglas* and *Burdine* were cases which arose under Title VII of the Civil Rights Act of 1964, the principles articulated in those cases also are applicable to actions under the ADEA. *Cuddy* v. *Carmen,* 694 F.2d 853, 857-8 (D.C. Cir. 1982), 30 EPD 933,024; *Sutton v. Atlantic Richfield Co.,* 646 F. 2d 407 (9th Cir. 1981), 26 EPD 9 (31,897; Loeb v. Textron, *Inc.,* 600 F. 2d 1003 (1st Cir. 1979), 20 EPD 930,028. However, in order to demonstrate that one has been discriminated against because of age under the ADEA, a Complainant must show that age was a determining factor in the decisions alleged to be discriminatory. See, *LaMontagne v. American Convenience Products, Inc.,* 750 F.2d 1405 (7th Cir. 1984); *Coburn v. Pan American World Airways, Inc., 711* F.2d 339 (D.C. Cir. 1983), *cert, denied,* 464 U.S. 994 (1983).

As noted by the Court, the factual circumstances necessarily vary in discrimination cases. Consequently, the courts have developed models for certain common situations to assist in determining whether a prima facie case has been established. See *Burdine* at 256, n. 6; *McDonnell Douglas* at 802, n. 13.

In order to establish a prima facie case of sex discrimination under the disparate treatment theory, a Complainant must establish that: 1) she is a member of a protected class; and 2) she was treated differently from a similarly situated

employee not within Complainant's protected class, with respect to some term, condition or privilege of employment, under circumstances that give rise to an inference of unlawful discrimination.

Generally, in order to establish a prima facie case of unlawful age discrimination under the disparate treatment theory, a Complainant must establish that: 1) she is a member of a protected class; and 2) she was treated differently from a. similarly situated employee, not within Complainant's protected. class or one substantially younger, with respect to a term, condition or privilege of employment under circumstances that give rise to an inference of unlawful discrimination.

In regard to disciplinary matters, one could establish a prima facie case of discrimination by showing that: 1) the Complainant is a member of a protected class; 2) she was qualified for and satisfying the requirements of her position; and 3) she was disciplined.

Generally, in order to establish a prima facie case of unlawful discrimination based on reprisal for having engaged in protected EEO activity, the Complainant must show that: 1) she engaged in protected activity; 2) the employer was aware of the protected activity; 3) an adverse action was taken against Complainant; and 4) there is a nexus between the adverse treatment which occurred and the prior protected activity. *Hochstadt v. Worcester Foundation for Experimental Biology,* 425 F. Supp. 318, 11 EPD 10,644 (D. Mass 1976), *aff'd,* 545 F.2d 222 (1st Cir. 1976); *Grant v. Bethlehem Steel Corp.,*

622 F.2d 43 (2d Cir. 1980). One manner in which the Complainant may show such a nexus is to demonstrate a proximity in time between the two events that would lead one to infer, absent any other reasonable explanation, that the motive of the latter was punishment for the former.

Harassment is hostility from a supervisor, coworker, and/or subordinate which affects the terms, privileges, and/or conditions of a person's employment. Harassment is illegal if and only if the supervisor, coworker, and/or subordinate engages in hostility because of the employee's sex, race, religion, age, national origin, disability, and/or prior EEO activity. It is not enough for the employee to show that he/she was treated poorly. In order for the treatment to constitute unlawful harassment, the employee; must show that the treatment was discriminatory, in other words because of the employee's membership in one or more of the; protected classes above. Furthermore, the employee must show that: the hostility was so severe and/or pervasive that it impacted his or her ability to work.

With respect to a claim of retaliatory harassment that rises to the level of a hostile work environment, the harassment must be sufficiently severe or pervasive that it constitutes adverse treatment that is reasonably likely to deter protected activity by that individual or other employees. EEOC Compliance Manual, § 8, pp. 8-15 and cases cited at n. 41 and 42 (May 20, 1998).

In order to establish a case of harassment that rises to the level of a hostile work environment, the

harassment must be sufficiently ongoing and continuous to constitute unlawful discrimination. *Mangan v. Department of Veteran Affairs,* EEOC Appeal No. 01961472, at 3-4 (December 30, 1996) (vacating dismissal by Agency). Moreover, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an objectively hostile or abusive work environment. The conduct must also be subjectively perceived by the victim to be abusive. *Harris v. Forklift Systems, Inc.,* 114 S.Ct. 367, 370 (1993). See also *Oncale* v. *Sundowner Offshore Services, Inc.,* 118 S.Ct. 998, 1998 WL 88039 at p. 3-4 (March 4, 1993) (same, stressing requirement that the harassment be severe). Further, the harassment must be (a) based on the [race or age or prior EEC activity] of the complainant, and (b) imputable on some factual basis to the employer. *Spicer* v. *Com. of Va., Dept. of Corrections,* 66 F.3d 705, 710 (4th Cir. 1995)(en banc).

In a hostile environment case perpetrated by co-workers, one way to impute liability to the employer is to show that it knew or should have known of the harassment and took no effectual action to correct the situation. See Katz v. *Dole,* 709 F.2d 251, 256 (4th Cir. 1983); *Spicer, 66* F.3d at 710; and of., *Restatement (Second) of Agency* § 219(2) (b) (the master was negligent or reckless) . This showing can be rebutted by the employer either directly, or by pointing to prompt remedial action reasonably calculated to end the harassment, *Katz*, 709 F.2d at 256.

Where a supervisor creates a hostile environment with no tangible employment consequences, an employer may avoid liability only by raising an affirmative defense subject to proof by a preponderance of the evidence that (a) the employer exercised reasonable care to prevent and correct promptly the harassing behavior, and (b) the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth;* 118 S.Ct. 2257, 1998 WL 336326, p. 18 (June 26, 1998) (sexual harassment case); and *Faragher v. City of Boca Raton,* 118 S.Ct. 2275, 1998 WL 336322, p. 24 (June 26, 1998) (same).

VI. ANALYSIS AND CONCLUSIONS OF LAW

Prima Facie Cases

Disciplinary Letter of Reprimand - April 2001

Complainant established a prima facie cases of unlawful discrimination based on sex and age in regard to this issue. In March 2001 when the events leading to it occurred and in April 2001 when the Letter of Reprimand was issued, by virtue of her gender and age, Complainant was a member of classes protected under the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act of 1967, as amended. Although it could be argued that Complainant's failure to return her signed Performance Plan was an example of her non-compliance with the requirements of her position, I find that Complainant was qualified for

and satisfying the normal requirements of her position as shown by her Superior ratings on Performance Appraisals and awards given her for her performance. Complainant was harmed when she was given a Letter of Reprimand. She has also demonstrated that she was treated differently from other employees supervised by Wilburn. Consequently, she established prima facie cases of sex and age discrimination in regard to the Reprimand issued in April 2001.

In addition, Complainant established a prima facie case of unlawful discrimination based on reprisal in regard to this issue. Prior to the dates of the events leading to and the issuance of the Letter of Reprimand, Complainant had engaged in EEO activity. Wilburn and other managers were aware of that activity which had been raised by Complainant when she was issued a Letter of Warning by Wilburn in 2000. Based on the proximity in time between the two events that could lead one to infer, absent any other reasonable explanation, that the motive of the latter disciplinary action was punishment for the former EEO activity, Complainant established a prima facie case of reprisal in regard to the Reprimand.

Denied Payment for Overtime - May 2001

Complainant failed to establish prima facie cases of discrimination based on sex or age in regard to the denial of 91 hours of overtime. As noted above. Complainant was a member of protected classes based on sex and age at the time when she was, J denied payment for the 91 hours of overtime she

claimed that she had worked. However, she has not demonstrated that she was treated differently from a similarly situated employee under circumstances that give rise to an inference of unlawful discrimination. No other employee presented a timecard claiming overtime worked without having earlier specifically requested the overtime. Complainant was advised just days earlier than when she worked the claimed 91 hours of overtime to seek prior approval for overtime. She did not. Therefore, the overtime was denied. Clearly, she has not presented evidence of circumstances that give rise to an inference of unlawful discrimination. Consequently, she failed to establish prima facie cases of sex or age discrimination in regard to this denied overtime.

Complainant also failed to establish a prima facie case of unlawful discrimination based on reprisal in regard to this issue Prior to the dates of the overtime worked and denied in May 2001. Complainant had engaged in EEO activity in 2000 and received EEO counseling in regard to the Letter of Reprimand issued in April 2001. Wilburn and other managers were aware of that activity. Although there is a proximity in time between the two events that could lead one to infer, absent any other reasonable explanation, that the motive of the latter disciplinary action was punishment for the former EEO activity, I find that Complainant failed to establish a prima facie case of reprisal in regard to the overtime denial. The clear and undisputed notice to Complainant to get prior approval for overtime just days before she worked the overtime and her disregard of that admonition, belie Complainant's

claim that there is a connection between her EEO activity and the denial of overtime. The overwhelming weight of the evidence demonstrates that there is a reasonable explanation that counters even the scintilla of evidence needed to establish a prima facie case. Accordingly, Complainant cannot establish a prima facie case of reprisal in regard to the denial of overtime.

Disciplinary Suspension - November 2002

Complainant has established a prima facie case of unlawful discrimination based on reprisal in regard to this issue. Prior to the dates of the events leading to the Suspension, and the Proposal and the Suspension decisions by Wilburn and Bradley, Complainant had engaged in EEO activity. Carroll, Wilburn, Bradley and other managers were aware of that activity which had been raised by Complainant previously in 2000 and 2001. The Suspension occurred shortly after the EEOC Hearing was held on the two previously discussed issues. Based on the proximity in time between the two events that would lead one to infer, absent any other reasonable explanation, that the motive of the latter disciplinary action was punishment for the former EEO activity, Complainant established a prima facie case of reprisal in regard to the Suspension.

Agency's Reasons/Pretext

Disciplinary Letter of Reprimand - April 2001

Based on the evidence, as noted below Complainant failed to prove that the Agency's

articulated reasons for the events discussed above were based on intentional discrimination. Having not shown that the Agency's reasons are a pretext for discrimination, Complainant failed to prove that the Agency discriminated against her in regard to the Reprimand, the denial of 91 hours of overtime, and the Suspension.

In regard to the events leading to the Reprimand, it is undisputed that Wilburn gave Complainant the Performance Plan. Complainant argued in her Closing Argument that Wilburn handed it to others but merely left it on Complainant's chair. However, testimony of co-workers demonstrates that he tried to include her in meetings and to see her to hand it to her, but she was not available. Since Complainant believed she signed and made copies of it, there is no question that she received the Plan. If she wanted to discuss it with him in person, by phone or by email, she could have done so. She did not.

There is also no question that Wilburn repeatedly communicated to Complainant that she still needed to provide him a signed copy. Complainant did not explain to Wilburn in email or testify during the hearing why she did not personally hand the signed Plan to Wilburn at least once when she knew from repeated emails that he had not received it. Complainant argued that although he wanted to be sure that Complainant understood the change in the Performance Plan for 2001 from past Plans, he never spoke to her about it. That also can be said about Complainant. She said she told him once that she had returned the Plan to him in his

inbox as she usually did with documents for him. However, she did not recount a discussion she initiated about the emails from him stating that he still had not received the signed Plan from her. None of Complainant's co-workers apparently initiated a discussion with Wilburn about the changes, so it was not unnatural for Wilburn to not initiate a conversation with Complainant about the changes in Plan since she, like her co-workers, was not raising them to him as a concern. As noted above, based on the evidence, I conclude that Complainant did not return a signed Plan to Wilburn. Complainant argued that there is no regulation stating that the Plan had to be signed. However, she does not dispute that a supervisor's instructions must be followed. Complainant received the Plan and knew that Wilburn did not receive her signed copy of the Plan. Yet, she did not write him to say I left it for you or I will meet you to hand it in. Instead, she claims to have done the same drop off in an inbox that she knew was unsuccessful twice before in getting the signed copy to him. As stated above, based on the evidence, I conclude that Complainant never signed or at least never delivered a signed copy to Wilburn.

Hanbury evaluated Wilburn's reported problems with Complainant about this matter, recommended the disciplinary action and drafted the Letter of Reprimand. Wilburn then delivered the Letter to Complainant. Complainant has not demonstrated that the Agency's reasons for the Reprimand for failing to follow instructions are a pretext for discrimination based on age, sex or reprisal.

Denied Payment for Overtime - May 2001

Although Complainant believed Wilburn had authorized overtime when she was assigned the Congressional Report, it was clear from his email to her after approving the 19 hours of overtime and 24 hours of credit time for the earlier pay period that she must get specific pre-approval of overtime before working any more overtime and expecting to be paid. Complainant did not dispute that she did not get the 91 hours pre-approved after receiving Wilburn's email about having to do so after that date. Complainant has not demonstrated that the Agency's reason for the denial of overtime is a pretext for discrimination based on age, sex or reprisal.

Disciplinary Suspension - November 2002

In regard to the Suspension, Carroll, Wilburn and Bradley were aware of Complainant's EEO activity at the time the events unfolded leading to Complainant being suspended. And, although the events occurred in a proximate time to Complainants' EEO activity, the reasons for the requirement for year-end status reports, emails, and the Suspension have been fully explained by Carroll, Wilburn and Bradley. As stated by one of her co-workers, even if Complainant had made up the status of projects, since no one checked, she could have done that at the meeting. Then, no emails, meetings, orders, proposed Suspension or Suspension would have followed. However, Complainant chose to tell Carroll at the meeting that she could come and gather the data herself

because Complainant was busy. The Complainant chooses now not to see this as rude and possibly insubordinate behavior on her part at a time of the fiscal year when all employees were busy, not just Complainant. She never responded with the information to the repeated requests by Carroll and Wilburn. They eventually gathered the information themselves. Complainant argued in her closing statement that she had already presented to Wilburn the reports she usually did about her workload. However, if these reports were deemed sufficient by Complainant, why did she not read them or from them to Carroll at the meting when all that was asked was what still remained to be done in the fiscal year. Complainant has not demonstrated that the Agency's reasons for the Suspension for failing to follow, instructions are a pretext for discrimination based on age, sex or reprisal

Complainant has not presented persuasive evidence showing that the sequence of events leading to and the issuance of the Reprimand, denial of payment for the 91 hours of overtime or the sequence of events leading to and the Suspension were tainted with discriminatory animus. She clearly did not demonstrate that age was a determining factor in any of these actions by the Agency. Although she presented the scintilla of evidence necessary to establish a prima facie case in regard to some of these allegations, she has not shown that the Agency's legitimate nondiscriminatory reasons for actions involved with the issuance of the Reprimand or denial of payment for the overtime or the Suspension are a pretext for discrimination on any basis.

The Agency had cause to deny overtime and issue discipline in a progressive manner to an employee who did not follow her supervisor's instructions. She did not sign and return the Plan. She did not get prior approval for overtime. She did not provide requested information about the status of her end-of-year projects to Carroll or Wilburn even when ordered to do so. Consequently, based on the totality of the evidence and having adjudged the credibility of the witnesses, I conclude that the Complainant has not proven, by a preponderance of the evidence, that the Agency discriminated against her on any alleged basis when she was issued a Letter of Reprimand in April 2001, when she was denied payment for 91 hours of overtime worked in May 2001, and when she was issued a Suspension in November 2002.

Harassment/Hostile Work Environment

Complainant alleged that between April 2001 through the time she received a Suspension in 2002, she was subjected to harassment because of her prior EEO activity. She had previously alleged harassment based on her sex, age and reprisal. However, Complainant has not shown that any of the actions claimed to form a pattern of harassment is related to a protected basis. Complainant acted in such a manner that she was disciplined and denied overtime. She cannot now use this succession of events where she was disciplined for repeated improper conduct as a basis to claim she is the victim of harassment and a hostile work environment. I conclude that Complainant has failed to show that any of these, or other work place

situations about which sh'S testified, were motivated by reprisal or her age or sex. An discussed above, Complainant failed to prove that the Agency discriminated against her in regard to the denied overtime or discipline. Complainant also claimed that her co-workers talked about her and about her EEO activity. She also claimed that Wilburn wanted to remove her from EAD. Although she is creating the insubordinate events that may lead to that, she has not shown that: Wilburn has taken severe enough actions to make that a fact. He credibly denied having an interest in removing Complainant who he described as a good worker who will not follow instructions or get along with others. Complainant ignores the facts that Wilburn also gave her awards and Superior ratings on her Performance Appraisals during this period. Based on the record, there is absolutely no evidence from which an inference can be drawn that Wilburn or Bradley began to take reprisal action against her to remove her while giving her awards for good performance. Similarly, there is no evidence to show that the alleged incidents occurred because of her age or sex.

It is within management's prerogative to require an employee to follow instructions. The Complainant argued that the fact that Wilburn had not given direct orders or this level of discipline tc others showed that she was being harassed. However, Wilburn's actions also can be seen as appropriate since no evidence was presented of another employee refusing to sign and return the Plan or refusing to report on the end of year status of projects within their control. Had Complainant not

refused to sign her 2001 Plan or give a status report about her year end projects, she would not have received the Reprimand or Suspension. Had she gotten prior approval of overtime, it might have been allowed. I conclude that the Agency has given legitimate nondiscriminatory reasons for these actions which have not been shown to be a pretext for discrimination.

Complainant is asked to join into social gatherings in the office but elects not to do so. Although some of the testimony demonstrates inappropriate comments on the part of EAD co-workers, this has not been shown to have been done to harass Complainant because of her age, sex or EEO activity. It is merely the unpleasant actions of rude co-workers who need to act more maturely in the workplace.

Clearly, the Agency managers need to assure any complainant that their private EEO complaints are kept private and not discussed by co-workers. Wilburn and Carroll should be more careful about sharing information needed by managers and warn employees under their supervision about discussions about a co-worker's private business.

In conclusion, none of Complainant's allegations either separately or taken together rise to an actionable level of harassment. Although Complainant belongs to classes provided protection from unlawful discrimination, she has not shown that she was subjected to harassment as a" result of membership in a protected class. The complained of actions were valid management decisions.

Complainant has not shown that the decisions were made in consideration of her gender, age or participation in EEO activity. Accordingly, Complainant cannot prevail in a claim of harassment under the hostile work environment theory of Title VII. Finally, there is absolutely no evidence that Complainant was treated differently because of her age, sex or prior EEO activity.

In reaching the decisions below, I have adjudged the credibility of witnesses who appeared during the five-day EEOC Hearing. I find that although there are some instances of confusion, other than that of the Complainant, the testimony given by the witnesses is worthy of credence. As noted above, on many instances, based on demeanor and contradictory statements, I have found Complainant's version of the facts less believable than that of other witnesses.

VII. DECISION

Based on the evidence of record, as well as findings of fact and conclusions of law set forth above, Complainant failed to prove, by a preponderance of the evidence, that the Agency unlawfully discriminated against her based age, sex or reprisal when she was issued a Letter of Reprimand in April 2001 and when she was denied payment for 91 hours of overtime worked in May 2001.

Based on the evidence of record, as well as findings of fact and conclusions, of law set forth above. Complainant failed to prove, by a

preponderance of the evidence, that the Agency unlawfully discriminated against her based on age, sex or reprisal when she was allegedly harassed and a victim of a hostile work environment in 2001.

Based on the evidence of record, as well as findings of fact and conclusions. of law set forth above, Complainant failed to prove, by a preponderance of the evidence, that the Agency unlawfully discriminated against her based on reprisal when she was issued and served a 5-day Suspension in November 2002.

Based on the evidence of record, as well as findings of fact, and conclusions of law set forth above. Complainant failed to prove, by a preponderance of the . evidence, that the Agency unlawfully discriminated against her based on reprisal when she was allegedly harassed and a victim of a hostile work environment during 2002.

For the Commission:

September 23, 2003
DATE

/s/ Linda A. Kincaid
LINDA A. KINCAID
ADMINISTRATIVE JUDGE

NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(b), 109(g) or 109(1). **With the exception detailed below, the complainant may not appeal to the Commission directly from this decision**. EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the order entering judgment, and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. §1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has <u>not</u> issued its final order within forty (40) calendar days of its receipt of the

order entering judgment and this decision, the complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency. All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
Post Office Box 19848
Washington, D.C. 20036
Fax No. (202) 663-7022

Facsimile transmissions over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. See 29 C.F.R. §1614.504. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within thirty (3 0) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER ENTERING JUDGEMENT and DECISION were served by regular U.S. Mail September 24, 2003 to the following:

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Ann M. Veneman, Secretary
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Adjudication Division/Office of Civil Rights
1400 Independence Avenue, SW
Washington, D.C. 20250-9440

/s/
Legal Technician

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 8, 2007

No. 06-1280
8:05-cv-00175-PJM

ADELINE B. BENJAMIN

Plaintiff – Appellant

v.

ANNE Veneman, Secretary, United States Department of Agriculture

Defendant – Appelle

ORDER

[Entered May 8, 2007]

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Judge William, Judge Michael, and Judge Motz.

For the Court,

/s/ Patricia S. Connor
CLERK

* * *

THE COURT: All right. Have a seat.

Adeline B. Benjamin has sued Ann M. Veneman, Secretary of the U.S. Department of Agriculture. This is a single-count claim for employment discrimination under Title 7, as amended, of the Civil Rights Act of 1964, 42 U.S.C., Section 2000E, @ et sequens. The motion of the defendant to dismiss or for summary judgment is before the Court.

Just to narrow the focus rather quickly, a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(B)(6) really tests the sufficiency of the complaint, and all inferences are taken in favor of the plaintiff if she has, in fact, stated any kind of colorable claim. With regard to a motion for summary judgment, if the evidence in the record shows the absence of a genuine issue of material fact, the moving party is entitled to a judgment as a matter of law.

Again, inferences are drawn in favor of the party against whom the motion is filed, but the party cannot rest on mere affirmations and pleadings, and appropriate record evidence has to be shown.

This is a case, frankly, where it is properly analyzed as a motion for summary judgment and not as a motion to dismiss. The Court has been invited to consider a lot of record evidence outside the mere complaint of the plaintiff, so on that basis, the Court reviews the case.

The basic allegations in the complaint are that the plaintiff is a female born on 6/28/54, and at the time of the events in question, I believe, was in the 46- to 48-year range. She was an employee at the U.S. Department of Agriculture, of which Veneman was/is the secretary. She was employed at all relevant times as a grants and agreements specialist in the Extramural Agreements Division of the Administrative and Financial Management staff, Agricultural Research Service, in Beltsville.

She claims that in September 2000, she filed an EEO complaint alleging hostile working environment based upon a letter of warning that she received in July of 2000, and that, in consequence, she was subjected to intentional discrimination based on sex and age and then retaliated against.

She claims that on April 4th, 2001, she received from her supervisor, @ Curtis Wilburn, what she describes as a, quote, bogus letter of reprimand, and then she was, in May of 2001, directed by Wilburn to complete a congressional report, but then she was denied overtime of some 91 hours that she said she had been promised.

And then she claims that in November 2002, she was issued a five-day suspension for insubordination, which was also in retaliation for her earlier claims of illegal discrimination.

She claims that she — in her complaint, she complains that she has been subjected to a hostile work environment on the basis of age, gender and has been retaliated against and unfairly disciplined.

There is some allegation that the supervisor has yelled and screamed at her, pounding on his desk, making threatening comments, that other coworkers have harassed her, and that this would be the basis of her claim.

The matter has been before the EEOC, and her claim has been denied in that respect and is before this Court de novo.

The defendant's motion for summary judgment alleges that there is no genuine issue of material fact and that, with respect to all of the plaintiff's claims, that the defendant is entitled to judgment as a matter of law.

There appear to be three essential claims here, three factual clusters, that underlie the various claims that the plaintiff makes: First, the April 4, 2001 letter of reprimand; second, the denial of pay for overtime; and, third, the five-day suspension.

The letter of reprimand that the plaintiff claims is bogus appears as Defendant's Exhibit 6, and it was dated April 4, 2001, as indicated, and it states, the letter: This constitutes an official letter of reprimand for your failure to follow supervisory instructions. And then Mr. Wilburn's letter continues: On March 20, 2001, I sent you an email message, subject CY2001 performance plan, which directed you either — to either sign and date the performance plan as acceptable or submit in writing your concerns, issues or questions regarding the plan

by 5 p.m. on that date. The message also advised you of possible disciplinary action for failure to respond to this direct order.

It was necessary for me to issue this order because I had requested this information previously on March 15 and March 19, 2001, emails to that effect, parenthetically, I note, and you failed to respond to my request for information. The nature of the employer — employee/employer relationship does not grant the employee the latitude or discretion to determine for himself/herself which rules, policies and instructions he/she will follow and which he/she will not. To do so constitutes misconduct. As a federal employee, you have the responsibility and are expected to adhere to the highest standards of conduct.

By your actions, you have, demonstrated a disregard for reasonable standards of conduct and a serious inability and/or willingness to accede to lawful authority. The misconduct you are charged with will neither be tolerated or condoned as it adversely affects the efficiency of the service and a serious inability and/or unwillingness on your part to work harmoniously with your supervisor and so on.

It goes through then the need to emphasize that the employer will not tolerate this misconduct and then gives advice as to any grievance rights that the recipient of the letter, the plaintiff, might have.

This is allegedly a bogus letter. The fact of the matter appears to be, though, that the defendant has not — did not sign and date the performance

plan as acceptable or in writing. That really appears to be largely without — without objection.

Whether the plaintiff felt she needed to or did not need to, clearly there is nothing bogus, in the Court's view, when the defendant — excuse me, when the plaintiff rejects signing this plan. To the extent that that is alleged to be retaliation for an earlier claim that the plaintiff made in 2000 in connection with another altercation, whatever it may be, it has — there is clearly a legitimate nondiscriminatory reason for the employer's action in this case, and the mere fact that a year earlier there may have been an EEOC claim does not raise any sort of potential nexus as a matter of law.

But it further — as I say, it's not direct evidence of discrimination, as required. It's not the indirect evidence under the McDonnell Douglas standard, that the employee's somehow treated discriminatorily with regard to what she did or did not do. Her own suggestion, very vague, that maybe someone else didn't have to do this plan doesn't — doesn't pass muster.

This particular event in and of it itself demonstrates nothing as a matter of law that approaches potential illegal discrimination.

With regard to the denial of pay for overtime, again, it's clear that while there may have been some earlier verbal authorization to the plaintiff to work overtime, there is absolutely no doubt that written missives were sent to the plaintiff at various times

telling her that, with regard to overtime, she would have to have it approved in advance.

There is an email of 5/23/01, and the letter's from Mr. Wilburn again, that says: On November 27, 2001, I sent you an email approving your time and attendance record, which included seven hours of compensatory time that had not been approved in advance. My November 27 email also advised you that future overtime and compensatory time must be requested in advance, consistent with established @ DAD policy. Your time and attendance record for Pay Period 9 includes 19 hours of overtime that was not requested in advance, as you've been instructed to do.

Following our discussion this morning, and based on my understanding that the overtime is needed to complete @ DAD's response to the Senate questions, I'm approving your time and attendance record for Pay Period 9, including 19 hours overtime. You are again advised that overtime and compensatory time must be requested in advance; otherwise, time will not be approved for pay.

And there's also, obviously, in the record, various policies and procedures which indicate that overtime pay has to be approved in advance.

Looking at Extramural Agreements, Division @ SEARCH @ EAD, Policy and Procedures at page 4, and under the section entitled credit time, overtime, compensatory time, it reads: EAD employees must obtain advance supervisory approval to earn credit

time in excess of one hour per workday, and then all overtime and compensatory time must be approved in advance by the division director.

Likewise, there is a separate policy statement set forth that's been referred to by the defendant.

And, again, the plaintiff indicates that she did not pay mind to the written request for — that she get prior authorization. She was relying on what she claims was an earlier verbal request. That simply makes no case at all. There's just no question again, as a matter of law, that the plaintiff had an obligation to follow the directive of her supervisor, and to say he authorized something earlier defines logic, experience and otherwise creates no issue of material fact.

She did not get prior authorization, that's clear, after he sent the written notice, and she's — she was not entitled to overtime pay.

And, again, no nexus whatsoever with an earlier claim of protected activity, that this would have been in retaliation for anything that she did.

And throughout, of course, no issue of age, no issue of gender, nothing of that sort here.

And, finally, the five-day suspension that came in November of 2002. And, again, she was asked to provide several times end-of-year reporting on pending projects, and she and other of her coworkers were so asked. She indicated that — she conceded that she told the supervisor, Mr. Wilburn, and more

directly Sherry Carroll, the grants and agreements program manager, she was too busy to report on her projects. They could come to her cubicle and do that for herself — for themselves. They could compile this information for themselves.

And she was then sent emails that at that time — indicating that she was supposed to come forward with these reports or that disciplinary action would be taken. Start with Exhibit 33, an email to Ms. Benjamin from Mr. Wilburn dated 9/21/02. She was told in the last part of the memo,after some back and forth about what she had been told earlier, quote: This memorandum is submitted to advise you of the requirement to submit a list of all pending actions for which you are responsible to Ms. Carroll by 9 a.m. Monday morning. You were advised that the failure to comply with this request may result in disciplinary @ action.

And she responded on September 28, 2002 in her own memo to Mr. Wilburn, and she said that she invited Ms. Carroll, along with EAD personnel, to come to her cubby and compile the data, and Ms. Carroll replied in an irate tone of voice I'm not going to compile a list for you. Ms. Carroll further demanded that I transport all the files from my desk to her office. She said that on September 27, 2002, after my tour of duty, you ordered me to meet in Ms. Carroll's office without prior notification. I was belittled, humiliated, harassed and prohibited from performing my duties. These actions of harassment and retaliation are a continuation of my pending EEO complaint, and, again, I invited you and Ms.

Carroll to my desk to compile a list. You both refused, and so on.

And then there was, in fact, in response to that, a proposed five-day suspension, which, in fact, occurred, and appropriate letters to that effect were sent to the plaintiff. Although she claims she didn't get the proposed letter, she got the actual letter of suspension and was, in fact, suspended.

Again, the suggestion of the plaintiff is that all this has some nexus with age or gender or retaliation for something that occurred in either 2000 or 2002, earlier, just because these claims of protected activity to the EEOC were filed, and somehow there's a nexus.

Again, the mere fact that events occur close in time do not establish necessarily a prima facie case of retaliation. The requirement for retaliation as a prima facie matter is that the plaintiff has to show that she engaged in protected activity, such as filing a complaint with EEOC, that the employer acted adversely against the plaintiff and that the protected activity was causally connected to the employer's adverse action to this effect, for example, @ Carter vs Ball at 33 F.3d. 450 and 460, a Fourth Circuit case from 1994, but once this burden is shown, the burden is on the employer to rebut the presumption of retaliation by articulating a legitimate nondiscriminatory reason for its decision, and the plaintiff then has to demonstrate that the reason was mere pretext for retaliation by proving both the reason was false and that discrimination was the real reason for the challenged conduct, and the

plaintiff always has this burden of persuading. I think it's on that basis that the Court evaluates the defendant's motion for summary judgment.

The plaintiff engaged in protected activity. No question about that. The employer acted adversely with regard to the five-day suspension. No question about that. The question is whether, prima facie, there is any claim that the protected activity was causally connected to the employer's adverse action, and, of course, there really isn't any nexus at all other than time.

Even the suggestion that — the alleged remark by the supervisor that if you file a complaint, it's going to hurt you, or it's not going to hurt you, that doesn't, on balance, in any way affect the outcome of this case on a prima facie basis because there's only a presumption of retaliation.

Here again, there's a legitimate nondiscriminatory reason that cannot be refuted, which is that a supervisor asks an employee to prepare a list of pending projects at the end of the year, and the employee says, in effect, I'm too busy. You come to my office. You do it. I mean that so flies in the face of normal supervisor/employee relationships, that merely to say that I said you do it and that creates illegal discrimination somehow arguably with a nexus to retaliation or to age or gender discrimination is absolutely beyond the pale of reason. It doesn't have any connection whatsoever.

There was a legitimate nondiscriminatory reason for what the employer did in this case, but were there any question about that, what the plaintiff has to show, and there has to be some evidence of this in the record, that arguably the reason given by the defendant was a pretext for retaliation, and what's the pretext? I mean the pretext is that even though she refused to sign the end-of-year report and was suspended, having earlier been involved in a disciplinary matter, that somehow this was pretext for really retaliation for doing that. It doesn't wash.

I might say the earlier claim with regard to verbal altercation that the plaintiff was involved in with another employee, both employees got virtually identical letters about the verbal altercation that they were involved in. Frankly, the Court's view is that — and I understand the concession that the Government makes, that any kind of claim that's put before the EEOC arguably can, if there's retaliation, be the basis for a claim, but this reprimand that was given to the plaintiff and the other coworker in 2000 had no basis at all in any sort of illegal discrimination. May have been unfair, may have been unreasonable, but there was nothing that was illegal under the Civil Rights Act of 1964.

Allowing, however, that that could still be the basis for retaliatory claim, there is no logical nexus between that and all the disciplinary actions that followed. They all were independently based with legitimate reasons, as a matter of law, and there is no basis for this case to go any further.

The defendant's motion for summary judgment will be granted, and I'll enter an order to that effect today. The motion to dismiss will be deemed moot.

Thank you, counsel.

(Proceedings concluded.)